# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES NEW YORK BRANCH OFFICE

LEE DECORATING CORP.

and

Case 29-CA-084956

ALBERT FRANZONE, AN INDIVIDUAL

Colleen Pierce-Breslin, Esq., Brooklyn, NY for the General Counsel.

Judith Garcia, Esq., Smithtown, NY for the Charging Party.

## **DECISION**

Steven Fish, Administrative Law Judge: Pursuant to charges filed by Albert Franzone (Franzone or Charging Party) on July 11, 2012,<sup>1</sup> the Director for Region 29 issued a complaint and notice of hearing on September 20, alleging that Lee Decorating Corp. (herein called Respondent) violated Section 8(a)(1) and (3) of the Act by refusing to consider for hire and refusing to hire Franzone because Franzone was a member of a union and to discourage employees from membership in a labor organization.

The trial with respect to the allegations in said complaint was held before me in Brooklyn, New York on November 14. A letter brief was received from General Counsel and has been carefully considered. Based upon the entire record, including my observation of the witnesses, I make the following:

# Findings of Fact

# I. Procedural History and Trial

The instant complaint was filed, as noted, on September 20 and required Respondent to file an answer by October 4. Having not received an answer from Respondent, the board agent sent a letter to Respondent, dated October 5, reminding it that no answer had been received by the October 4 deadline but adding that if no answer was received by October 12, the Region would seek a default judgment based on the complaint allegations.

Thereafter, the Region received a letter, dated October 9, from David Edelman, president of Respondent, responding to the complaint on behalf of Respondent, stating that he will be representing Respondent in the matter.

The letter indicates specific denials or admissions of various paragraphs in the complaint and included purported explanations for Respondent's decision not to hire Franzone.

<sup>&</sup>lt;sup>1</sup> All dates, hereinafter, referred to are in 2012, unless otherwise indicated.

The trial was scheduled to commence on November 14 at 9:30 am at the regional office in Brooklyn, New York. Neither Edelman not anyone else appeared on behalf of Respondent.

I requested that General Counsel attempt to contact Respondent by telephone to see if they intended to appear. She reported that she telephoned Respondent at the number listed on the correspondence from Respondent (516-938-9361), and there was no answer and no voicemail.

5

10

15

25

30

35

40

45

50

She then telephoned another number (845-659-6045), which she believed was associated with Respondent. This was based on the fact that the charges filed by Franzone listed that number as a cell phone number for Respondent. Franzone listed that number on the charges as a number for Respondent based on facts, which will be described more fully below.

Further, the Region conducted an internet search on Lee Decorating Corp. for 845-659-6045. The search results, dated August 7, 2012, reflected that Lee Decorating Corp. had addresses in two locations at Flushing, New York and Whitestone, New York with that phone number.

The board attorney, Colleen Breslin, had telephoned that number on or about November 5, and an individual answered the phone and identified himself as Stan Gross. Breslin identified herself and asked for Mr. Edelman, stating that she wished to talk to Edelman about the National Labor Relations Board trial and to remind him of the trial date.

Gross responded that he did not know where Edelman was and that he did not have a phone number where Edelman or Respondent could be reached.

On November 7, Breslin served a subpoena tecues tecum on Respondent along with a letter reminding Edelman of the trial date and asking him to contact her. Although the subpoena and letter were served on Respondent, Edelman never responded to Breslin's calls nor did it comply with the subpoena.

No postponement request was ever made by Respondent to adjourn the hearing, scheduled for November 14.

On the date of the trial, November 14, neither Edelman nor anyone else from Respondent appeared. I directed Breslin to telephone Edelman to see if he intended to appear.

After again not being successful in reaching Respondent at the 516-number, Breslin tried 845-659-6045. Gross again answered. During this conversation, Gross stated that he was a cousin of Edelman but did not know where Edelman was or whether Edelman intended to appear at the trial. Breslin had informed Gross that she was calling again about the trial scheduled for that day. Breslin asked Gross to give a message to Edelman that there is a trial scheduled for that day and that we were about to start and proceed with the trial and remind Edelman of his right to appear. Gross replied that he will do that if "I talk to him."

Subsequent to that conversation between Breslin and Gross, neither Edelman nor anyone else from Respondent appeared at the trial. The hearing proceeded to be held without the appearance of anyone from Respondent.

After the hearing closed, General Counsel, at my instruction, sent a letter to Respondent dated November 15, which stated it was a follow-up to her November 7 letter, reminding Respondent of the trial scheduled for November 14. The letter reflects that no representative

from Respondent appeared on that date, that she tried to call Edelman at the 516-number but was unable to connect or leave a voicemail and that she left a message with his cousin, Stan Gross, at the 845-number that the hearing was about to begin.

The letter further stated that the judge delayed opening the hearing until 10:10 am and then evidence was presented, questions were asked of witnesses and the judge set a date for filing of briefs. Edelman was notified that if he or Respondent intended to file a brief the date was noted as was the address of the reporting service for the transcript of the hearing. Respondent did not file a brief or any other response subsequent to the receipt of that letter.

10

15

5

## II. Jurisdiction

Respondent is a corporation with a place of business in Plainview and Hicksville, New York, where it provides residential painting and wallpapering services. During the past year, Respondent derived gross revenues in excess of \$500,000 and purchased goods and materials valued in excess of \$5,000 from points located outside the State of New York.

Respondent admits, and I so find, that it is and has been an employer engaged in commerce within the meaning of the Act.

20

25

# III. The Alleged Refusal to Consider for Hire and to Hire

Franzone has been a rank-and-file member of District Council 9 IUPAT, Local 1486, Painters and Allied Trades for many years He has been a painter with over 25 years of experience and has a number of required certified licenses as well as decorating certificates. He has worked on jobs from the tip of Montauk, Long Island to Manhattan, New York as well as worked in New Jersey and Connecticut, Nassau and Suffolk Counties and in all the boroughs of New York City.

30

Franzone worked on some jobs through the Union and the union hiring hall but also has worked on many non-union jobs. According to Franzone, he can work on non-union jobs, even if he is a union member.

35

In the summer of 2012, Franzone was unable to find work thought the Union and engaged in an independent job search. In the midst of that search, Franzone saw an ad listed on craigslist<sup>2</sup> for two open positions of lead painter and staff painter. The ad listed a telephone number of 516-938-9361 and location of Hicksville, New York. On June 28, 2012, Franzone telephoned the number in the ad and spoke to David Edelman, Respondent's president. Franzone used the cell phone of his step-daughter, Jessica Cylvica, to make the call.

40

Franzone informed Edelman that he was replying to Respondent's ad on craigslist and told Edelman that he believed that Respondent would be happy to hear from him since he was certified for a lot of things that were posted on that ad. Franzone listed a number of the certifications that he had obtained over the years. Edelman responded, "You're the kind of guy for me." Edelman then asked where Franzone lived. Franzone replied East Moriches, Long Island. Edelman responded that "it's a little far. My office and shop happen to be on Route 106

45

<sup>&</sup>lt;sup>2</sup> Craigslist is an online classified advertisement website with sections devoted to jobs, housing, items for sale and personal messages.

in Hicksville." Franzone answered that he had done work all the way from Montauk to Manhattan and that he travels anywhere for work.

Edelman than asked if Franzone had a computer and asked for Franzone's email address so he could send Franzone a job application.

5

10

15

20

25

30

35

40

45

Franzone provided his email address, which was <u>unionyes@optonline.net</u>. Edelman responded, "Oh, no. You're a union painter. Shouldn't you be looking for work out of your hiring hall or from your agent?" Franzone replied that he was not happy with the Union and was on unemployment and would really like to work. Edelman replied, "Go fuck yourself, screw you and screw the union. I would never put a union man in my shop."

Franzone, in an effort to rehabilitate himself in Edelman's eyes, repeated that he was well-qualified and added that he was willing to work with Edelman about salary. Edelman was not convinced. He answered, "No. no way. I'm not going to hire a union man. This is not a union shop." Edelman then hung up the phone.

A few minutes later, Franzone decided to give it another shot and called Edelman back. Edelman answered the phone, and obviously noting the number on his phone, began the conversation by saying, "Albert!" Franzone replied yes. Edelman asked what's up. Franzone responded that he would really like the opportunity to work for Respondent, that he did beautiful work and that he would "shelf his book." According to Franzone, "shelf his book" meant that he could work at a non-union shop and that D.C. 9 had changed its by-laws so that he would not be penalized for doing so. Franzone reminded Edelman of this change in D.C. 9's by-laws. Edelman replied, "I don't care. This is not a union shop. I can hire and fire who I want." Franzone responded that what Edelman was doing was discriminatory, and Edelman hung up the phone once again.

About a half-hour later, a phone call came in on the cell phone of Cylvica, which, as noted, was used by Franzone to call Respondent. Cylvica answered, and the person, on the other end, asked for Franzone. Cylvica handed the phone to Franzone. The call came from 845-659-6045, as noted above, the number from which Breslin had previously spoken to Stan Gross, cousin of Edelman, and which number had been identified as associated with Lee Decorating at addresses in Queens, New York.

The individual on the call did not identify himself. He asked Franzone if he had called Respondent looking for a job. Franzone answered, "Yes, I did." The individual asked if he was affiliated with D.C. 9 and what local he was in. Franzone answered Local 1486. The man then said, "Don't you have a way to get work? Why don't you call your business agent or organizing staff?" Franzone replied that he was on the out of work list on New York State unemployment, was certified and ready, willing and able to work. The man replied, "Screw the Union. This is a non-union shop. Find work elsewhere, been in business for years." He also cursed at Franzone yelling, "Fuck you, scumbag" and also hung up the phone on Franzone.

While the individual, who called Franzone did not identify himself, I find based on the evidence that the individual was Stan Gross. This finding is based on the fact that the phone number used to call Franzone came from the number, where, previously Gross had answered

 $<sup>^{3}</sup>$  According to Franzone, the office is 40 miles from his house, approximately 40 minutes by car.

and identified himself to Breslin as Edelman's cousin and that number had been associated with Respondent in an internet search. Further, the call was made a half-hour after he called Edelman and Respondent, and the call made reference to that call.

5

10

15

20

25

30

35

40

45

Based upon the above circumstances, I conclude that Gross was the caller, and I find further that Gross was acting as an agent for Respondent in his communications with Franzone. In that connection, I note the timing of the call and the substance of the conversation, which was similar to Edelman's previous conversation with Franzone. It appears, and I so conclude, that Edelman directed or asked his cousin to call Franzone, interrogate him about which local he was affiliated with and then confirm that Respondent would not hire Franzone because Respondent was a non-union shop.<sup>4</sup>

After these calls, Franzone did not hear from Respondent and never received a job application from Respondent.

# IV. Analysis and Conclusions

The Board, in *FES*, 331 NLRB 9 (2000), set forth the evidentiary framework for analyzing refusal to hire and refusal to consider for employment complaint allegations. In refusal to hire allegations, General Counsel must show under the burden shifting analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981) that (1) respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct, (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire and (3) that antiunion animus contributed to the decision not to hire the applicants. Once that is established, the burden shifts to respondent to show that it would not have hire the applicants, even in the absence of the union activity or affiliation. 331 NLRB at12.

In refusal to consider allegations, the General Counsel bears the burden of showing (1) that the respondent excluded applicants from the hiring process and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to respondent to show that it would not have considered the applicants, even in the absence of their union activity or affiliation. Id at 15.

Here, the evidence overwhelmingly demonstrates the existence of both refusal to hire and refusal to consider for hire violations with respect to Respondent's conduct towards Franzone. There can be no dispute that Respondent had plans to hire and was hiring since it placed an ad on craigslist for two painter positions. It is also clear that Franzone possessed extensive experience as a painter and that he indicated to Respondent his qualifications and willingness to work during his conversations with Edelman on June 28.

The record also reflects that, after Franzone enumerated his experience and certifications for Edelman during their conversation, Edelman stated, "You're the kind of guy for me." After a brief discussion about Franzone's address and commute, Edelman asked for Franzone's email address so he could send him an employment application. When Franzone disclosed his email address that contained the words "union yes," Edelman's position and sentiments on hiring Franzone immediately changed.

<sup>&</sup>lt;sup>4</sup> *Tradesman International*, 351 NLRB 399, 402 (2000) (Board finds, based on circumstances, including timing of call, ID number of caller and substance of call, that unidentified caller was agent of employer).

Edelman cursed at Franzone and told him to "go fuck yourself, screw the union. I would never put a union man in my shop." Franzone tried to reassure Edelman that he needn't worry about the rate of pay, but Edelman replied that Franzone should get employment from the union hiring hall. Franzone continued to plead for a job and stated that he was unhappy with the Union and would really like to work. Edelman reiterated, "No. No way. I am not going to hire a union man. This is not a union shop." Edelman then hung up the phone.

Two or three minutes later, Franzone called Edelman back "trying to give it another shot." During his conversation, Franzone again indicated his desire to work for Respondent, stressing his work experience and capabilities and offered to "shelf his book," describing to Edelman that under the union rules, he can work for a non-union company, even though he was a union member. Again, Edelman was unmoved. He told Franzone to call the business agent and repeated that "this is not a union shop. I can hire and hire who I want."

15

20

10

5

The above evidence convincingly demonstrates that antiunion animus motivated both Respondent's decision to refuse to hire and refusal to consider for hire Franzone. The statements of Edelman constitute virtual admissions that the decisions by Respondent were unlawfully motivated. *Shisler Electrical Contractors*, 349 NLRB 840, 841 (2007) (statement made by official of employer that accepted application of applicant that if he gave applicant a job the only thing that he would be to organize his people, sufficient to establish animus); *Dynasteel Corp.*, 346 NLRB 86, 89 (2005), enf. 476 F.3d 253 (5<sup>th</sup> Cir. 2007) (employee excluded from hiring process when he was not given an employment application, where he appeared wearing union shirt); *McKee Electric Co.*, 349 NLRB 463, 464 (2007) (officials of employer stated to applicants that it would not hire union members).

Therefore, a strong and compelling prima facie violation has been demonstrated by the above evidence.

30

35

25

I note that I have further found above that based on an evaluation of all the evidence that Franzone received a call about a half-hour later from Gross, Respondent's agent,<sup>5</sup> wherein Gross reiterated Edelman's comments that Franzone should be looking for work through the Union and that "this is a non-union shop, screw the Union and find work elsewhere." While I do rely on this additional evidence of antiunion animus by Respondent, I note that, even without considering Gross's comments as binding upon Respondent, the above described evidence of Edelman's comments during the June 28 conversations, demonstrates compelling evidence of discriminatory motivation sufficient to meet General Counsel's burden of proof.

40

Accordingly, the burden shifts to Respondent to demonstrate that it would have taken the same action against Franzone (i.e. excluding him from the hiring process by refusing to send him an application and by refusing to hire him for either of the two available positions), absent his union membership or affiliation.

45

Respondent has fallen far short of meeting its burden in that regard. Indeed, it has presented no credible or probative evidence. As related above, Respondent did not appear at the trial, and, therefore, no probative evidence of non-discriminatory reasons for its actions was submitted. While Respondent's answer did include a different version of Edelman's conversation with Franzone, I have not credited this assertion as I found Franzone's believable

<sup>&</sup>lt;sup>5</sup> See *Tradesman International*, supra, 351 NLRB at 402.

and consistent testimony to be credible. Absent Edelman testifying on the record about this conversation, his assertions in his answer has no evidentiary value.

Similarly, Edelman's statement in Respondent's answer that Respondent did not hire Franzone or send him an application because Franzone lived too far from Respondent's premises cannot be credited or considered as probative evidence. Once again, Edelman did not appear at trial and did not present this testimony on the record, subject to cross-examination and observation.

Accordingly, Respondent has failed to meet its burden of proof that it would have failed to consider or to hire Franzone, absent his union affiliation or membership and that it has, therefore, violated Section 8(a)(1) and (3) of the Act. FES, supra; Dynasteel, supra; Sproule Construction, supra.

Conclusion of Law

- 1. The Respondent, Lee Decorating Corp., is an employer engaged in commerce within meaning of Section 2(2), (6) and (7) of the Act.
- 2. By refusing to consider for employment or to offer employment to Albert Franzone because of his union affiliation or membership, Respondent had violated Section 8(a)(1) and (3) of the Act.
- 3. The unfair labor practices, described above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

# Remedy

Having found that the Respondent had engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully considered for hire and refused to hire Albert Franzone, I shall recommend that Respondent offer to Franzone positions for which he would have been hired, absent the Respondent's unlawful discrimination, or, if those positions no longer exist, to substantially equivalent positions without prejudice to his seniority and other rights and privileges enjoyed, discharging if necessary any employees hired in his place.

Franzone shall be made whole for any loss of earnings he may have suffered due to the discrimination practiced against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012). The Respondent shall also be required to expunge from its files any reference to the unlawful refusal to hire and refusal to consider for hire and to notify Franzone in writing that this has been done.

50

45

5

15

30

35

40

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

## ORDER

5

The Respondent, Lee Decorating Corp., Plainview and Hicksville, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

10

25

35

40

- (a) Refusing to hire or consider for hire employee-applicants because of their union affiliation or to discourage union activities.
- (b) In any like or related manner, interfering with, constraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
  - 2. Take the following affirmative action necessary to effectuate the policies of the Act
- (a) Within 14 days of the date of this Order, offer employment to Albert Franzone, who would have been employed by Respondent for the positions for which he applied but for the unlawful discrimination against him, or if such positions no longer exist, to substantially equivalent positions, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging if necessary any employees hired in his place.
  - (b) Make Franzone whole for any loss of earnings and other benefits he may have suffered by reason of the Respondent's unlawful refusal to consider for hire or to hire him, in the manner set forth in the remedy section of the decision.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider for hire or to hire Franzone and, within 3 days thereafter, notify him in writing that this has been done and that the refusal to consider for hire or to hire him will not be used against him in any way.
  - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
  - (e) Within 14 days after service by the Region, post at its Plainview and Hicksville, New York facilities copies of the attached notice marked "Appendix." Copies of the notice, on forms

<sup>&</sup>lt;sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>&</sup>lt;sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 28, 2012.

5

10

15

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

	Dated, Washington, D.C. April 9, 2013	
20		
		Steven Fish,
		Administrative Law Judge

## **APPENDIX**

## NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT fail or refuse to consider for hire or to hire applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL make whole, with interest, Albert Franzone for the economic loss he suffered, plus interest compounded daily, as a result of our failure and residual to consider him for hire and to hire him.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Albert Franzone for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL offer Albert Franzone, who would be currently employed by us but for our unlawful refusal to consider and to hire him for employment in positions for which he applied. If these positions no longer exist, we will offer him employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which he would have been entitled if we had not discriminated against him.

WE WILL notify in writing Albert Franzone that any future job application will be considered in a nondiscriminatory manner.

		LEE DECORATING CORP.		
		(Employer)		
Dated	Ву			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: <a href="https://www.nlrb.gov">www.nlrb.gov</a>.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100 Brooklyn, New York 11201-4201 Hours: 9 a.m. to 5:30 p.m. 718-330-7713

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.